

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the
Insurance Agents' Licenses
of David S. Kane, No. 0309330,
and Michael Pohl, No. 0029512,

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

and

In the Matter of the Insurance
Agency License of Financial
Benefits Company.

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on: November 14, 1989 in Faribault; November 15, 1989 in Minneapolis; November 20 and 21, 1989 in St. Cloud; and November 29, 1989, December 1, 4, 5, 7 and 18, 1989 and January 10, 1990 in Minneapolis. The record in this matter closed on July 12, 1990, the date of submission of the last post-hearing brief.

Peggy J. Birk, Special Assistant Attorney General, 340 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Complainant, Minnesota Department of Commerce. After the initial brief was filed by Complainant, Carolyn Hamm, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, was substituted as counsel for Ms. Birk. Carl E. Norberg, Attorney at Law, 700 St. Paul Building, 6 West Fifth Street, St. Paul, Minnesota 55102, appeared on behalf of Respondents David S. Kane. Michael Pohl and Financial Benefits Company.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Minnesota Department of Commerce shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner of Commerce. Exceptions to this Report, if any, shall be filed with Thomas Borman, Commissioner, Department of Commerce, 133 East Seventh Street, St. Paul, Minnesota 55101.

The extended length of time that the record remained open between the last date of hearing and the submission of the last post-hearing brief was due, in part, to medical problems experienced by Respondents' attorney which did not permit him to file a brief until June 19, 1990.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether the Respondents, in the course of selling life insurance to Minnesota customers:

- a. misrepresented the Senior Security Policy (a universal life insurance policy) to buyers in violation of Minn. Stat. 60A.17, subds. 6, 6c(a)(3), (6), (9) (1988), 72A.20, subds. 1, 2, and 18 (1988) and Minn. Rule 2790.0500, subd. 1 (1987); and
- b. used false, deceptive and misleading sales material in violation of Minn. Stat. 60A.17, subds. 6c(a)(3), (6), (9) (1988), 70A.20, subds. 1, 2 and 18 (1988) and 72A.12 (1988).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. David S. Kane has been licensed as an insurance agent for over 25 years. Kane is a chartered life underwriter (CLU) and a certified financial planner (CFP). In 1968, Kane formed a company called D.S. Kane & Associates, Inc., an insurance agency in Fargo, North Dakota. In late 1986 or 1987, Kane formed Financial Benefits Company, a marketing organization that acts as a managing general agent for insurance companies, including Western States Life Insurance Company (Western States). David Kane was the sole owner of Financial Benefits Company, which is licensed by the Minnesota Department of Commerce as an insurance agency.

2. Kane entered into a managing general agent agreement with Western States which provided that Kane, on behalf of Western States, would recruit, train and supervise agents to sell the Senior Security Policy (SSP), a Western States life insurance product. These agents signed an "independent contractor" agreement with Western States. There was no written contract between Mr. Kane and the agents he supervised. Only Western States had the authority to hire and fire these agents.

3. Western States began marketing the SSP after David Kane approached them about the policy, which he had been marketing successfully at another local company. Kane made a presentation to Western States which included a package of sales material which would be shown to a prospective customer and form the basis of the sales talk the agent would deliver.

4. The SSP is a universal life insurance policy. The "policy value" is

the gross premium less the service charge of 7.5% of the premium. The net premium (gross premium less charges) becomes the policy value. Every month, regardless of the premium frequency, two separate transactions occur involving the policy value: (1) a fund in which the net premium is deposited is charged a mortality cost for the net amount at risk (the death benefit less the policy value). Also deducted at this time is a \$4.50 policy fee. (2) the balance of

the policy value is credited with Western's current interest rate, which is guaranteed to be at least four percent. The policy requires annual premiums, has a benefit payable at death and the net premium accrues interest at a variable rate which is the cash surrender value.

5. The SSP was targeted for senior citizens in the Midwest between the ages of 55 and 80 who were economically successful farmers or small business owners in rural communities.

6. Michael Pohl has been licensed to sell life insurance in Minnesota since 1984. Pohl has had a business relationship with Kane since 1981. In 1987, Kane recruited Pohl to sell the SSP for Western States. On December 30, 1987, Pohl signed an independent contractor agreement with Western which included an application stating that Pohl was presently employed by D.S. Kane Associates.

7. Kane was responsible for training Pohl to sell the SSP. Pohl attended a one and one-half day training seminar put on by David Kane in Fargo, North Dakota. During this seminar, Pohl was instructed as to the proper selling techniques for the SSP and provided with sales material to assist him in marketing the policy to Minnesota senior citizens. The sales presentation and materials were put together by David Kane although much of the printed material had already been used in other states or for other companies. All of the printed materials had been approved for use by Western States which had done a more thorough than usual review of the sales presentation and materials that were to be used. Because Minnesota does not require that sales materials be submitted to the Commerce Department for approval, materials used in marketing the SSP were not submitted to the Department.

8. David Kane received an "override" commission for every SSP sold by Michael Pohl.

9. During 1988, Michael Pohl sold 29 SSP universal life insurance policies to Minnesota senior citizens.

10. The SSP sales "process" was initiated by mailing "lead" material to selected Minnesota senior citizens. The lead material was mailed by Information Distribution Center, a Omaha, Nebraska corporation whose sole purpose it was to function as a collection agency for insurance leads. David

Kane had contracted with Information Distribution Center to send out the lead material and furnish the names and addresses of persons who responded to Financial Benefits. The lead material mailed out was designed by the persons who operated Information Distribution Center and had been used in approximately 45 other states for four years before David Kane contracted to use it. Mr. Kane was aware of this history of use prior to contracting for the services offered by Information Distribution Center.

11. The lead material sent out by Information Distribution Center consisted of a mailing envelope which had printed in bold face above the addressee the words "IMPORTANT BULLETIN". Inside the envelope was a document entitled "federal estate tax information bulletin" which stated to the potential customer that "you are invited to send for free federal estate tax information and how you can avoid undue estate taxation". The "bulletin", which further stated that "many families are encountering severe estate tax problems upon death of the principal", urged the reader to fill in and return an enclosed

data card to receive further information. The "data card" had printed on it in bold red letters "FEDERAL ESTATE TAX INFORMATION". The reader was instructed to fill out his or her name, age, occupation, telephone number, county of residence and social security number on the card for return to the Information Distribution Center. On the bottom left of the data card, "Western States Life Insurance Company" was printed. The return envelope listed as the addressee, "federal estate tax information" with the Information Distribution Center address at Omaha, Nebraska. When data cards were returned (approximately a one to three percent return rate), the names and addresses of the returners were sent to Financial Benefits to make calls and schedule appointments. The Minnesota names were turned over to Michael Pohl.

12. After receiving the names, addresses and phone numbers of Minnesota senior citizens who responded to the lead material generated by Information Distribution Center, Mr. Pohl would schedule an appointment to visit the "responders". Pohl used the same sales presentation for all of the persons he visited. This consisted of 55 pages of written material which emphasized federal estate taxes and estate planning. Life insurance was not mentioned until the 47th page of the 55-page document. Pohl began his sales "process" by a "warm-up" conversation period of approximately one-half hour. Then, Mr. Pohl began going through the written sales material. The initial part of the presentation included: (1) a "losses now-future losses" sheet which stated that probate, estate taxes, state inheritance taxes, and federal and state law changes would result in future losses; (2) a sheet stating that "everyone has to pay" which cited examples of substantial estate settlement costs for Eddie Kantor, Gypsy Rose Lee and General George S. Patton; (3) a sheet stating "when you die, Uncle Sam may ask for your money" which cited a Supreme Court decision concerning the right of a taxpayer to decrease, legally, the amount of his taxes; (4) a schedule of estate and gift taxes; and (5) an 18-page Form 706 used for filing a federal estate tax return.

13. Mr. Pohl knew when he made his sales presentation to Minnesota citizens that Minnesota did not have a state inheritance tax. Additionally, he was aware after talking to the 29 policy purchasers that none presently had a federal estate tax liability. As part of the sales presentation, Mr. Pohl did a rough calculation to determine the value of the individual's estate (page 31 of the presentation). At no time during the initial sales presentation did

Michael Pohl refer to the 7.5% premium deduction, the \$4.50 policy fee deduction, or the mortality cost deduction. This information was, however, contained in a "leave behind" brochure which explained the terms of the SSP to purchasers after an application and check were obtained by Pohl. Michael Pohl would fill out the application for insurance for the purchaser, get a check for the first premium fee, and turn the application in to Financial Benefits for processing. If prospective purchasers or policyholders had questions concerning the SSP or the agent, they could have called either Financial Benefits Company or Western States.

14. The Eddie Kantor, Gypsy Rose Lee and General George Patton examples listed in the sales presentation were outdated information with respect to the law in effect when Mr. Pohl was selling the SSP. The examples overstated taxes that would be owed or showed taxes owing when in fact there would be none under the current law.

15. The schedule of estate taxes used in the presentation did not reflect the application of the unified credit so taxes were shown as being payable for small estates.

16. After receipt of the application for insurance and premium payment from Michael Pohl, Financial Benefits Company would Immediately send out a mailgram to the purchaser informing them that the application had been received and that they would receive a telephone call to verify the medical information. A Financial Benefits representative would then call the purchaser informing them that they had purchased a life insurance policy and that future premium payments would have to be made. After the phone call, a letter was sent to the purchaser, again explaining to them that they had purchased a universal life insurance policy which provided death benefits and that future premium payments would have to be made. After the insurance application was approved by Western States, Financial Benefits sent another letter to the purchaser informing them that the insurance policy was being sent to the agent for delivery. None of the letters contained information regarding the \$4.50 per month service fee, the 7.5% premium reduction or the surrender charges if the policy were cashed in.

17. As part of the application, the purchaser signed a "sales receipt" which stated, in part, that "you are applying for a universal life insurance policy which will provide funds to your heirs at your death." The receipt set forth the scheduled annual premium aspect to the policy and stated that there would be substantial penalties if the policy is cancelled in its early years.

18. At the time Michael Pohl delivered the SSP to the purchaser, two delivery receipts were signed wherein the purchaser "acknowledged" that he/she had purchased a life insurance policy. The receipts set forth the interest payment on the savings aspect to the insurance policy and discussed the surrender charges should the purchaser decide to cancel the policy in its early years. Michael Pohl went over various aspects of the insurance policy at the time of delivery.

19. Subsequent to the delivery of the policy, the purchasers had a 20-day "free look" period during which time they could elect to return the policy for a refund.

20. During Pohl's sales of the SSP, David Kane met with him on several occasions to discuss business. Kane spoke with Pohl every Saturday on the phone about SSP sales. Under the terms of Kane's managing general agent contract with Western States, Kane accepted personal liability for Pohl's debit balance and held Western harmless for Pohl's acts. Other terms of Kane's contract with Western State provided as follows:

GENERAL POWER AND_DUTIES

- 1.1 This Agreement is entered into by the parties in anticipation of the GA submitting annual premium to the Company which shall result in a minimum of 200,000 Production Credits' per calendar year to

GA and its subordinate agents.

- 1.2 GA shall have the power and authority as an independent contractor to conduct marketing activities and through, its agents procure applications for all company products which are subject to this Agreement.
- 1.3 The duty of the GA is to recruit new agents to the field force of Western States Life Insurance Company. GA shall provide whatever field support is necessary to develop adequate production from its agents.

4. RELATIONSHIP

- 4.1 GA and its agents shall act as an independent contractor. Nothing contained in this contract shall be construed to make GA or its agents an employee of this Company. GA shall be free to exercise its own judgment in carrying on its business. The Company, however, has prescribed rate books, manuals, instructions and other rules and regulations concerning the conduct of business submitted to the Company, GA and its agents will be required to follow them.

9. MARKETING ASSISTANCE

- 9.1 GA shall provide and conduct training seminars, workshops, product introductions and meetings with its agents concerning the products covered by this Agreement. The Company will bear no expenses in connection with these sessions unless agreed to in writing in advance.

(Ex, 16, Emphasis added.)

21. Western States had an incentive program for sales production of the SSP in Minnesota. Michael Pohl was close to earning a free trip to Hawaii from his sales in Minnesota before the investigation of this policy was begun.

22. On August 14, 1988, Michael Pohl sold an SSP to Esther Hohnstadt, an 80-year-old woman residing in St. Peter, Minnesota. Mr. Pohl collected a check for \$2,000 from Ms. Hohnstadt on that date. Pohl told Ms. Hohnstadt that the SSP would "save [her] on income tax." Ms. Hohnstadt was not told of the 7.5% premium deduction fee, the \$4.50 monthly fee or any surrender charges at the

time she bought the policy. Ms. Hohnstadt had no estate tax liability when she

purchased the SSP. After Ms. Hohnstadt received a letter from Western States concerning policy charges and offering a refund, she surrendered the policy and received a full refund. This letter was dated November 9, 1988 and was sent out by Western States as part of a proposed consent order "settlement" with the Minnesota Department of Commerce.

23. On June 15, 1988, Michael Pohl sold an SSP to Myron Frost, a 74-year-old resident of LeSueur, Minnesota. Mr. Frost purchased the SSP because, in part, Pohl told him that the \$1,000 he paid for the policy would be there in case Frost was put into a nursing home and the nursing home took all the rest of his assets. At the time he purchased the SSP, Mr. Frost was not aware that he had purchased the universal life insurance policy and of the \$4.50 monthly fee or the 7.5% premium fee. Myron Frost and his wife, Phyllis, then 69 years old, each paid \$1,000 for an SSP but each owned the other's policy. Mrs. Frost thought that the policy was like a savings plan that was tax-free and could not be taken by a nursing home. She would not have purchased a universal life insurance policy at that time if she had known the expenses involved with the policy.

24. The Frosts had no concerns about the SSPs they purchased until the State contacted them as part of the investigation herein. After the Frosts received a letter from the Minnesota Department of Commerce dated September 14, 1988 concerning the investigation of the Western States SSP, the Frosts decided to return their policies for a refund.

25. On January 20, 1988, Michael Pohl sold an SSP to Arlo Payne, a 71-year-old resident of Ruthton, Minnesota. At the time of the sale, Mr. Payne was not interested in life insurance but bought the policy based on Pohl's assertions that he could establish a savings plan and avoid probate. Payne was not aware of the \$4.50 monthly fee or the 7.5% premium deduction at the time he bought the policy. He was told by Pohl that he would earn interest on the full amount of his premium payment. Mr. Payne applied for and received a refund from Western States after receipt of its letter dated November 9, 1988.

26. On February 24, 1988, Michael Pohl sold an SSP to Leon Blenkush, a 74-year-old resident of St. Cloud, Minnesota. Pohl represented the SSP to Mr. Blenkush as an investment plan. Pohl also stated that there was a life insurance benefit included in the package. Mr. Blenkush applied for and received a refund from Western States after they contacted him concerning the policy. Mr. Blenkush was aware that he had purchased an insurance policy from Michael Pohl, however.

27. On March 23, 1988, Michael Pohl sold an SSP to Ben Zika, a 71-year-old resident of Sauk Rapids, Minnesota. At the time he purchased the policy, for which he paid \$1,000, Mr. Zika was not aware of the \$4.50 monthly

fee, the 7.5% premium deduction fee or surrender charges. He would not have purchased the policy if he had known about those charges. Mr. Pohl also sold an SSP to Marie Zika, Ben Zika's 64-year-old wife, for \$1,000. Mrs. Zika thought that Mr. Pohl was doing estate planning. Both Mr. and Mrs. Zika thought their entire premium payment would earn interest. Like her husband, Mrs. Zika was unaware of the \$4.50 monthly fee or the 7.5% premium deduction fee associated with the SSP. After finding out about these charges, she and her husband applied for and received refunds from Western States.

28. Alice Metzger, a 69-year-old resident of St. Cloud, purchased an SSP for \$1,200 from Michael Pohl on March 7, 1988. Mr. Pohl told Ms. Metzger that the SSP was a savings plan which would earn 8.5% interest. He did not disclose the \$4.50 monthly fee, the 7.5% premium deduction or surrender charges. Ms. Metzger thought her entire premium payments made after the first year would earn interest. Ms. Metzger was aware that she had purchased a life insurance policy with an annual premium. After finding out about the various SSP fees, Ms. Metzger applied for and received a refund on her policy.

29. Norbert Kron purchased an SSP from Michael Pohl on February 1, 1988 for \$1,200. Mr. Kron thought he was purchasing an investment plan rather than a universal life insurance policy and that his entire payment would earn interest. He was not aware of the fact that an annual premium was due or the insurance policy expense charges at the time he purchased the policy. Mr. Kron had no concerns about the policy until he heard about the investigation of Western States and the SSP on the radio. He later applied for and received a refund.

30. Theresa Goebel purchased an SSP from Michael Pohl on May 5, 1988 for \$1,000. Ms. Goebel is 72 years old and resides in Albany, Minnesota. She bought the SSP with the understanding that she was purchasing a savings plan with a death benefit feature. She was unaware of the monthly policy expense charges or the surrender fee at the time she purchased the SSP. She later cancelled the policy and received a refund after receiving the September 14, 1988 letter from the Minnesota Department of Commerce.

31. The SSP had no unique policy features which specifically related to payment of estate taxes or "death" expenses. The policy merely provided a lump sum death benefit like most other life insurance policies.

32. Sometime in the summer of 1988, the Minnesota Department of Commerce became aware of problems which had arisen concerning the marketing and sale of the SSP in Minnesota. A representative from the Department met with Western States Insurance Company representatives in Fargo, North Dakota to discuss the concerns. After discussions with Western States, and contact with some of the individuals who purchased SSPs in Minnesota, the Department issued a letter to

all 29 policyholders in the state on September 14, 1988 which reads as follows:

Dear Sir or Madam:

I am writing to request your assistance with an investigation being conducted by the Minnesota Department of Commerce, One of the many duties of the Department is to regulate the offer and sale of insurance products within the State of Minnesota. We are currently involved in an investigation of a specific form of insurance (universal life) which has been sold within this state. In reviewing the sales records of various companies, you have been identified as a purchaser of a universal policy offered and sold by The Western States Life Insurance [sic] Company. The policy was marketed as the "Western States Life Senior Security Policy."

Our investigation was initiated after receiving numerous phone calls from individuals evidencing considerable misunderstanding with respect to the content and/or structure of these policies. We are attempting to contact as many [sic] of the participants in these programs as possible in order to determine their understanding of the program they purchased.

I would appreciate your cooperation in answering the enclosed questionnaire dealing with the individuals and representations made to you at the time you purchased your program.

The companies who offered these programs have to date, been cooperative in resolving most of the problems related to the policies. Upon receipt of your completed questionnaire, it will be reviewed for the purposes of determining whether the content and/or structure of these programs was misrepresented at the time of sale. If such misrepresentation is alleged, we will review the matter with the company in an attempt to obtain an equitable solution.

I would appreciate your cooperation in completing the enclosed questionnaire and returning it to the below-noted party as soon as possible.

Ms. Heidi Almquist
Minnesota Department of Commerce
Enforcement Division
500 Metro Square Building
St. Paul, MN 55101

We will be attempting to contact you by phone within the next week to review the status of our investigation and if you [sic] desire, assist you in completing the questionnaire.

In closing, I would again like to emphasize that our inquiry into this matter is not meant to infer any wrongdoing on the part of any of the companies and/or agents involved. We are simply attempting to gather information so that we may determine whether a problem does exist and if so, the extent of that problem. Your cooperation with this inquiry will be greatly appreciated. If you have any questions regarding our inquiry and/or the enclosed questionnaire, please feel free to contact me at 612-297-3238.

Very truly yours,

MICHAEL A. HATCH
Commissioner

The statement contained in the letter that numerous phone calls had been received by the Department which evidenced "considerable misunderstanding" with the SSP was untrue. The Department had not received "numerous phone calls".

33. In the process of attempting to resolve this matter with Western States Life Insurance Company, Western States mailed a letter dated November 9, 1988 to all Minnesota policyholders which reads as follows:

We are writing about the insurance policy you purchased from Western States Life Insurance Company. This letter is to inform you further about the policy and provide you with the option to keep the policy or return it for a full refund.

Your policy, the Senior Security Policy "SSP" is a Universal Life Insurance product. Each month a \$4.50 policy fee and a fee for the mortality costs, which is determined by your age, sex, and health at the time the policy was issued, is deducted from the policy value. The interest earned on this amount and the premiums received in that month, less a 7.5% premium expense charge are added to the policy value. Therefore, your life insurance policy is not credited with interest on the entire premium payment. This was indicated in the illustration which was delivered to you with the policy. The current rate of interest being credited to this policy is 9.25% (4% guaranteed).

Your policy may have been purchased to provide death benefits to help pay estate taxes, final expenses or to provide for your heirs. You should be aware that in the event one spouse dies, the entire estate will most likely pass estate tax free to the surviving spouse. After the death of the last surviving spouse, the estate will still be exempt from estate taxes if it is less than \$600,000. We encourage you to discuss your specific situation with your attorney, accountant, or other tax professional if you purchased the policy to reduce estate taxes.

If, after reviewing the policy, illustration, delivery receipt, and sales receipt and materials, you believe you misunderstood the nature of the policy, you may apply for a refund of the entire amount of premiums paid plus 6% interest per annum.

We, of course, hope you are satisfied with your policy and that it is performing as you expected. We caution you that you may no longer be eligible for life insurance with another insurer and suggest that you carefully consider whether you wish to terminate this life insurance protection.

To apply for a refund, please complete the enclosed form and return it with your policy within thirty (30) days from the date you receive this letter to the following address:

Western States Life Insurance Company
Attention: James T. Lockhart, FLMI
Assistant Vice President, Consumer Affairs
700 South Seventh Street
Box 2907
Fargo, North Dakota 58108

If you have questions, you may contact me at our toll-free number, 1-800-437-4174.

Sincerely,

James T. Lockhart, FLMI
Assistant Vice President
Consumer Affairs

34. On November 8, 1988, the Commissioner of the Minnesota Department of Commerce issued Notices of and Orders for Hearing to David S. Kane, Michael Pohl, Financial Benefits Company and Western States Life Insurance Company. Subsequently, on February 23, 1989, a Consent Order was issued by the Commissioner resolving and settling the case against Western States Life Insurance Company.²

PERTINENT STATUTES AND RULES

Minn. Stat. 60A.17.

Subd. 6c. Revocation or suspension of license. (a) The commissioner may by order suspend or revoke an insurance agent's or agency's license issued to a natural person or impose a civil penalty appropriate to the offense, not to exceed \$5,000 upon that licensee, or both, if, after notice and hearing, the commissioner finds as to that licensee any one or more of the following conditions:

- (3) violation of, or noncompliance with, any insurance law or violation of any rule or order of the commissioner or of a commissioner of insurance of another state or jurisdiction;

²Respondents filed a Motion to Dismiss on August 30, 1989, asserting that the settlement and dismissal of the action against Western States also operates as a dismissal regarding Respondents herein. The Judge issued an Order dated

October 23, 1989 denying Respondents' Motion.

(6) misrepresentation of the terms of any actual or proposed insurance contract:

(9) that in the conduct of the agent's affairs under the license, the licensee has used fraudulent, coercive, or dishonest practices, or the licensee has been shown to be incompetent, untrustworthy, or financially irresponsible,

Minn. Stat. 72A.20

Subdivision 1. Misrepresentations and false advertising of policy contracts. Making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender insurance, shall constitute an unfair method of competition and an unfair and deceptive act or practice in the business of insurance.

Subd. 2. False information and advertising generally. Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine, or other publication, or in the form of a notice, circular, pamphlet, letter, or poster, or over any radio station, or in any other way, an advertisement, announcement, or statement, containing any assertion, representation, or statement with respect to the business of insurance, or with respect to any person in the conduct of the person's insurance business, which is untrue, deceptive, or misleading, shall constitute an unfair method of competition and an unfair and deceptive act or practice.

Subd. 18- Improper business practices. (a) Improperly withholding, misappropriating, or converting any money belonging to a policyholder, beneficiary, or other person when received in the course of the insurance business; or (b) engaging in fraudulent, coercive, or dishonest practices in connection with the insurance business, shall constitute an unfair method of competition and an unfair and deceptive act or practice.

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2790.0500 DECEPTIVE WORDS, PHRASES, OR ILLUSTRATIONS.

Subpart 1. General prohibition. No advertisement or representation, written or oral, may omit information or use words, phrases, statements, references, or illustrations if the omission of the information or use of the words, phrases, statements, references, or illustrations has the capacity, tendency, or effect of misleading or deceiving purchasers or prospective purchasers as to the nature or extent of any policy benefit payable, loss covered, or premium payable. The fact that the policy offered is made available to a prospective insured for inspection prior to consummation of the sale or an offer is made to refund the premium if the purchaser is not satisfied does not remedy misleading statements.

2795.0100 DEFINITIONS.

Subp. 8. Supervising agent. "Supervising agent" means an agent or general agent who contracts with, employs or engages one or more other agents to solicit applications for insurance, or to otherwise act as insurance agents on the supervising agent's behalf. In the case of an agency required to be licensed under Minnesota Statutes, section 60A.17, subdivision 1, the supervising agents, if not specifically designated, shall be the licensed officers of the corporate agency, or the partners of a partnership agency.

2790.2100 RESPONSIBILITY OF INSURER, AGENT, OR AGENCY.

Subpart 1. System of control required. Every insurer, agent, or agency shall establish and at all times maintain a system of control over the content, form, and method of advertisements and representations, oral and written, concerning its policies. All advertisements and representations, whether written or oral, regardless of by whom written, created, designed, or presented, shall be the responsibility of the insurer whose policies are so advertised or represented.

Subp. 2. Prior approval by insurer. An insurer shall require its agents or agencies and any other person or agency preparing advertisements naming the insurer or its products to submit proposed advertisements to it for approval prior to use.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce have

jurisdiction over this matter pursuant to Minn. Stat. 14.50 and 60A.17, subd. 6(c)(a) (1988). The Notice of Hearing was proper and the Department has fulfilled all relevant substantive and procedural requirements of law and rule.

2. The burden of proof that must be met by the Complainant herein is preponderance of the evidence, rather than any higher burden. Minn. Rule 1400.7300, subp. 5. The Judge has applied this standard within the meaning and intent of *In Re Hang*, 441 N.W.2d 488 (Minn. 1989).³

3. Financial Benefits Company, David Kane and Michael Pohl misrepresented the SSP and misled prospective purchasers in violation of Minn. Stat. § VXEG F D DQG § VXEGV I and 2; and Minn. Rule 2790.0500, subp. 1. Specifically, the Judge concludes that the following statements or omissions result in the above-violation: (1) statements that the SSP was a "savings" or "investment" plan; (2) statements that all premium monies paid would earn interest; and (3) the failure to reveal the insurance policy expense cost until after the purchase had been made.

4. Financial Benefits Corporation, David Kane and Michael Pohl used false and misleading sales materials in the process of selling the SSP in violation of Minn. Stat. 60A.17, subd. 6c(a)(3) and 16); and 72A.20, subds. 1 and 2. Specifically, the Judge concludes that the following materials violate the statutes cited: (1) the illustration of "losses now" and "future losses" with state inheritance taxes included in "future losses"; (2) the graphic giving three celebrity examples of estate settlement costs; and (3) the schedule of estate and gift taxes which implies that small estates will be burdened with estate taxation.

5. The Judge further concludes that the entire sales approach structured by David Kane and implemented by Michael Pohl, when viewed as a whole rather than in its individual parts, is misleading and misrepresents the life insurance product they were selling in violation of Minn. Stat. 60A.17, subd. 6c(a)(3) and (6); 72A.20, subds. 1 and 2; and Minn. Rule 2790.0500, subp. 1.

6. Disciplinary action against the licenses of Financial Benefits Company, David Kane and Michael Pohl is appropriate.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

³Wang was a case involving disciplinary action against a dentist by the Minnesota Board of Dentistry. The Minnesota Supreme Court applied a "preponderance of the evidence" test in its review process, but stated:

Even so, these proceedings brought on behalf of the state, attacking a person's professional and personal reputation and character and seeking to impose disciplinary sanctions, are no ordinary proceedings. He trust that in all professional disciplinary matters the

finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by evidence with heft.

441 N.W.2d at 492.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Commerce take appropriate disciplinary action against the insurance agents' licenses of David S. Kane and Michael Pohl and the insurance agency license of Financial Benefits Company.

Dated this 20 day of August, 1990.

PETER C. ERICKSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Transcript Prepared by Janet R. Shaddix & Associates.

MEMORANDUM

During the hearing on this matter, Gary Paulsrud, a CLU and former Western States employee, testified that life insurance was a product that had to be "sold". He explained this by stating that life insurance sales tend to be a "have to" sale rather than a "want to" sale. He stated that "have to" sales require a little more "push" for a sale than "want to" sales. Tr. Vol. VI, pp. 72-73. This entire case has examined the appropriateness and/or legality of the "push" exerted by the Respondents in their attempts to market the SSP in Minnesota to senior citizens. After a thorough review of all the evidence, the Judge agrees with the analysis testified to by the State's expert witness, Jerry Williams, a CLU and chartered financial consultant. Mr. Williams testified that the sale approach used by Respondents built a "fictitious problem" for potential purchasers because it began with an emphasis on future estate tax liability when there was none for any of the individuals who purchased the policy. Mr. Williams stated:

. . . This whole process took place where there was a fictitious problem being built where the life insurance was a solution. [it]..... was like selling somebody the idea that they should buy a boat when there is no lake to put it on..... It's important to find out the facts

of [sic] circumstances of the person you're dealing with before you start building a fictitious problem and suggest a solution to the problem that they don't have.

Tr.. Vol. V, pp. 95-96, 109. The sales presentation used by Respondents, discussed more fully below, shows clearly that Mr. Williams' analysis is correct.

The record in this matter shows that from the time the "lead" materials were sent out to Minnesota senior citizens up until almost the end of the sales presentation made to individuals by Mr. Pohl, the entire sales process focused on estate taxes and costs at death. Life insurance was not even mentioned until very late in the sales presentation. None of the 29 Minnesota purchasers had a current estate tax liability. The record also clearly shows that during the sales presentation, Mr- Pohl did not advise purchasers of the life insurance policy expenses until after a purchase had been made. Then, that information was contained in "leave-behind" material which the purchaser had available to read. Consequently, the purchasers were unaware of the policy expenses until sometime after the purchase was made. After doing the asset inventory with the customer, and determining that there was no estate tax liability, Mr. Pohl marketed the policy as a "savings" or "investment" plan with a death benefit attached. The Judge has concluded that this sales process was misleading to the consumer and misrepresented the nature of the product being sold.

Respondents argue that in order to violate the statutes cited above, the State must show that the "misrepresentations" were either fraudulent (intentional) or negligent, citing *Florenzano v. Olson*, 387 N.W.2d 168 (Minn. 1986). However, *Florenzano* was a tort claim and not brought under the regulatory authority of the Minnesota Department of Commerce. This Judge has previously held that neither intent nor negligence need be proved by the Department to substantiate its claim of "misrepresentation" pursuant to Minn. Stat. 60A.17, subd. 6c(a)(6). See, COM/1-84-015-PE, Order, issued June 14, 1984. This Judge has defined "misrepresentation" as an incorrect or misleading representation. No case law has been cited which interprets the regulatory statute just cited as requiring proof of intent or negligence. Additionally, the Judge points out that in the case of Sentry Insurance Payback Program Filing, 447 N.W.2d 454 (Minn. App. 1989), the court held that:

the determination of whether a statement is misleading is based on the overall impression created by the statement . . . The total impact may be deceptive or misleading even though the statement is technically not

false.

447 N.W.2d at 457. Minn. Rule 2790.0500 specifically makes it a violation to use any statements or materials which have the "effect of misleading or deceiving purchasers or prospective purchasers. The Judge has adopted the standards set forth in Sentry herein.

Specifically, the Judge has found that Respondents made oral misrepresentations and misleading statements as follows: (1) by stating that the SSP was a "savings" or "investment" plan to consumers; (2) stating that all of the premium money collected would earn interest; and (3) neglecting to inform the purchaser, prior to the time the purchase was made, of the \$4.50 per month policy fee, the 7.5% premium fee and the mortality costs. These statements or omissions constitute misrepresentations or misleading information within the meaning of the statutes and rules cited above.

Several pages of the printed sales material used by Respondents were misleading and misrepresentative. The illustration of "losses now" and "future losses" specifically referred to state inheritance taxes when Minnesota has no inheritance tax. The examples of estate settlement cost, for Eddie Kantor, Gypsy Rose Lee and General George Patton were overstated because they were not based on current law. Additionally, the estate settlement costs included California inheritance tax which is not applicable in Minnesota. The "schedule of estate and gift taxes" implies that small estates will be taxed. Although the schedule does refer to the "taxable estate", the Judge has concluded that this graphic is misleading to a lay person. Those documents, used in conjunction with the overall focus on estate taxation and death costs, created the misrepresentative sales scheme employed by Respondents.

The Judge has not found that the "lead" materials sent out by Information Distribution Center on behalf of Respondents are, in themselves, a violation of Minnesota law- Although these materials triggered a response from some Minnesota residents, their use was separate and distinct from the actual sales process itself. Obviously, the thrust of this case is the actual sales presentation made to Minnesota consumers. If Michael Pohl had used different sales materials and structured his presentation differently, the Judge doubts there would be an issue raised with respect to the lead materials. These lead materials are, however, a part of the entire sales approach devised by David Kane which the Judge has found to be misleading.

Respondents contend that Minn. Rule 2790.2100 set forth above immunize them from liability for the use of sales materials approved by Western States. The Judge agrees that this rule specifically makes the insurer liable for the use of improper sales material. However, the rule does not specifically insulate agents or agencies from the application of other rules or statutes. As has been pointed out above, agents and agencies also fall under the prohibitions contained in Minn. Stat. 60A.17, 72A.20 and Minn. Rule 2790.0500. These other provisions are also applicable in a case such as this. The Judge firmly believes that it was not the intent of Minn. Rule 2790.2100 to completely insulate Minnesota agents and agencies from liability for the use of improper sales materials even if those materials had been approved by the insurer.

Respondents David Kane and Financial Benefits contend that they should not be held accountable for the sales presentations made by Michael Pohl because there was no agency relationship between them. The Judge disagrees. The record in this matter shows clearly that even though Michael Pohl had an "independent contractor" contract with Western States and no contract with either David Kane or Financial Benefits, the totality of Kane's involvement in the marketing approach and his supervision of Michael Pohl make Kane and his agency concurrently responsible. The contract between David Kane and Western States specifically refers to "agents" which David Kane had the responsibility to hire, train and supervise. Mr. Kane received an override commission on all policies sold by the agents he supervised and Kane was responsible for the submission of a minimum level of premiums to Western States from those agents. The record shows that the applications for SSP coverage solicited by Michael Pohl were sent to Financial Benefits Company for follow-up and Mr. Kane consulted with Pohl on a regular basis concerning his sales of the policies. David Kane was an intermediary for Western States and assumed responsibility for the actions of the agents he supervised. The Judge has concluded that

David Kane's role falls within the definition of supervising agent contained in Minn. Rule 2795.0100, subp. 8 and he, along with Pohl and Financial Benefits, are responsible for the inappropriate marketing of the SSP set forth herein.

Lastly, the Judge points out that David Kane is portrayed as, and admits, to being a very successful, aggressive insurance salesman. The record shows clearly that David Kane is a highly respected member of the insurance industry whose opinion and expertise is valued. However, in this case, it is evident that Mr. Kane's "aggressiveness" went a little too far in marketing the SSP in Minnesota. This aggressiveness was successfully communicated to Michael Pohl who had almost won an incentive award from Western States based on SSP sales before this matter arose- The entire marketing approach which is at issue herein was devised by David Kane for implementation in Minnesota by Michael Pohl with backup services of Financial Benefits.

P.C.E.